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7 RICHARD NOLL AND RHYTHM
8 MOTOR SPORTS, LLC, Individually and on
9 behalf of all others similarly situated,
10 Plaintiffs,
11 v.
12 EBAY, INC.,
13 Defendant.

14 Case No. [5:11-cv-04585-EJD](#)
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**ORDER GRANTING MOTION FOR
FINAL APPROVAL OF CLASS
ACTION; GRANTING MOTION FOR
ATTORNEYS' FEES AND COSTS**

17 Re: Dkt. Nos. 134, 140
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20 Plaintiffs Richard Noll (“Noll”) and Rhythm Motor Sports, LLC (“Rhythm”) (collectively,
21 “Plaintiffs”) bring this is a putative class action against Defendant eBay, Inc., (“Defendant”)
22 regarding the recurring fees for the Good ‘Til Cancelled (“GTC”) listings. Plaintiffs are eBay
23 sellers who alleged that eBay failed to adequately disclose that the listing fees for GTC listings
24 would be charged on a recurring, monthly basis. See Dkt. No. 140 at 3. Presently before the
25 Court are Plaintiffs’ Motion for Final Approval of Class Action, and Motion for Attorneys’ Fees
26 and Costs. See Dkt. Nos. 134, 140.
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Having reviewed the Settlement Agreement and the parties’ and objectors’ arguments and
28 papers, the Motion for Final Approval of Class Action is GRANTED, and the Motion for
Attorneys’ Fees and Costs is GRANTED IN PART AND DENIED IN PART for the reasons set
forth below.

1 **I. BACKGROUND**

2 **A. Factual and Procedural Background**

3 **i. eBay's Marketplaces**

4 Listings on eBay.com are governed by Fees Schedules depending on the nature of the
 5 listing, referenced as: (1) Core, (2) Motors, and (3) Stores. eBay "Core" is eBay's overall
 6 marketplace on which sellers can list items for sale. eBay "Motors" consists of web pages on
 7 eBay dedicated to automotive vehicles, parts, and accessories. eBay Stores allows sellers to
 8 display all of their listed items in a single online "Store." See Dkt. No. 140-1 ("Verges Decl.") ¶
 9 8.

10 **ii. Before the Start of the Class Period**

11 Before September 16, 2008, the commencement of the Class Period, the GTC listing
 12 duration was available only on the Stores marketplace, and not for Core or Motors listings. See
 13 Dkt. No. 130 at 5. During this time, the Stores Fees Schedule contained the following table that
 14 explained that all fees for GTC Listings would be charged on a recurring basis every 30 days:

Listing Upgrade Fees		
Features	30 days	Good 'Til Cancelled (recurring 30-day listing)
Gallery	Free	Free
Gallery Plus	\$0.35	\$0.35 / 30 days
Subtitle	\$0.02	\$0.02 / 30 days
Listing Designer	\$0.10	\$0.10 / 30 days
Scheduled Listings	\$0.10	\$0.10
Bold	\$1.00	\$1.00 / 30 days
Border	\$3.00	\$3.00 / 30 days
Highlight	\$5.00	\$5.00 / 30 days

22 The Stores Fees Schedule contained this table at all times from September 16, 2008 through
 23 March 29, 2010. See Verges Decl. ¶ 9; see also Dkt. No. 130 at 6.

24 **iii. eBay Introduces GTC to Core and Motors**

25 On September 16, 2008, eBay made the GTC duration available for listings on Core and
 26 Motors. See Dkt. No. 130 at 6. According to Plaintiffs, the Fees Schedules for these listings did
 27 not state that GTC listing fees would recur, and the table of "Listing Upgrade Fees" looked like

1 this:

Listing Upgrade Fees		
Feature	Fee -- Auction Style, Fixed Price Format (3, 5, 7, 10 Days)	Fee -- Fixed Price (30 Days, Good 'Til Cancelled), Classified Ad
Value Pack	\$0.65	\$2.00
Gallery*	Free	Free
Gallery Plus	\$0.35	\$1.00
Listing Designer**	\$0.10	\$0.30
Subtitle	\$0.50	\$1.50
Bold	\$2.00	\$4.00
Scheduled Listings	\$0.10	\$0.10
Gift Services	\$0.25	\$0.75
Border	\$4.00	\$8.00
Highlight	\$5.00	\$10.00
Gallery Featured	\$24.95	\$74.95
Home Page Featured	\$59.95	\$179.95
List in Two Categories***	x2	x2

15 See Verges Decl. ¶ 10.

16 iv. Revisions to the Fees Schedules

17 On December 16, 2008, eBay revised the Core Fees Schedule (but not the Motors Fees
18 Schedule) by adding:

19 Good 'Til Cancelled renews automatically every 30 days until the
20 item sells or you end the listing. Insertion Fees are charged every 30
day period.

21 See id. ¶ 11.

22 eBay added this to the Motors and Stores Fees Schedules on March 30, 2010. Id. Finally,
23 on June 19, 2012, (after this case was filed), eBay added to all three Fees Schedules the following
24 disclosure:

25 Good 'Til Cancelled listings renew automatically every 30 days
26 until all of the items sell, you end the listing, or the listing violates
an eBay policy. Insertion fees and optional feature fees are charged
every 30-day period.

1 Id. The parties agree that listings initiated by eBay users after June 19, 2012 are not at issue in
2 this case. See Dkt. No. 130 at 8.

3 **v. Procedural Background**

4 Plaintiffs alleged that eBay was required, but failed, to clearly and unequivocally state that
5 both Insertion Fees and Optional Feature Fees would be charged every 30 days for GTC Listings
6 placed between September 16, 2008 and June 19, 2012.¹ See Dkt. No. 130 at 3. During the Class
7 Period, eBay added the phrase “Insertion fees are charged every 30 day period” to the end of some
8 of the relevant fees schedules. See id. On June 20, 2012 - nine months after the Complaint was
9 filed - eBay added the phrase “Insertion fees and optional feature fees are charged every 30-day
10 period” to all of the operative Fees Schedules. See id. Plaintiffs allege that GTC connotes an
11 indefinite listing duration and that the contract and eBay’s disclosures did not permit eBay to
12 charge recurring listing fees every 30 days for certain GTC listings. See id.

13 Plaintiffs seek to recover certain Insertion and Optional Feature Fees incurred after the
14 initial 30-day listing period (the “Disputed Fees”) for some listings placed between September 16,
15 2008, and June 19, 2012. See id.

16 In the Original Complaint, Plaintiffs asserted claims for (1) breach of contract; (2)
17 violation of the UCL, Cal. Bus. & Prof. Code § 17200; (3) violations of the false advertising law,
18 Cal. Bus. & Prof. Code § 17500 et seq. (“FAL”); (4) violations of the CLRA, Cal. Civ. Code §
19 1750 et seq.; (5) unjust enrichment/common law restitution; (6) fraud and deceit; and (7)
20 declaratory judgment. See Dkt. No. 1. On April 23, 2012, the Court denied eBay’s motion to
21 dismiss the claims for (1) breach of contract; (2) unjust enrichment; and (3) declaratory judgment.
22 See Dkt. No. 57. The Court granted the motion to dismiss all claims against the entities eBay
23 Europe and eBay International with prejudice and the (1) fraud; (2) UCL; (3) FAL; and (4) CLRA
24 claims without prejudice and with leave to amend. See id.

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¹ eBay generally charges two types of fees to list an item: (1) an “Insertion Fee,” which is the
27 initial fee charged to list an item; and (2)“Optional Feature Fees” (sometimes called “advanced
28 listing upgrade fees”) for optional features or upgrades that sellers may buy to increase the
chances for a successful sale, like highlighted or bolded listings.

1 After additional litigation, Plaintiffs filed their Consolidated Second Amended Class
2 Action Complaint (“SAC”) on October 2, 2012, alleging and re-alleging further facts in support of
3 (1) breach of contract; (2) UCL; (3) FAL; (4) Cal. Bus. & Prof. Code § 17600 (automatic
4 renewal/continuous service); (5) CLRA; (6) unjust enrichment; (7) fraud; and (8) declaratory
5 judgment claims. Dkt. No. 90. On October 17, 2012, eBay moved to dismiss the “fraud based”
6 counts two, three, five, and seven of the SAC. See Dkt. No. 91. On May 30, 2013, the Court
7 granted eBay’s motion to dismiss those claims with leave to amend. See Dkt. No. 101. The Court
8 dismissed with prejudice the automatic renewal/continuous service count of the SAC. See id.

9 On July 1, 2013, Plaintiffs filed their Consolidated Third Amended Complaint (“TAC”).
10 Dkt. No. 102. In the TAC, Plaintiffs assert causes of action for (1) breach of contract; (2) UCL
11 violations; (3) FAL violations; (4) violations of Business and Professions Code section 17600
12 (automatic renewal/continuous service); (5) CLRA violations; (6) unjust enrichment; (7) fraud;
13 and (8) declaratory judgment. See id.

14 On October 3, 2014, Plaintiffs filed their motion for class certification. Dkt. No. 118. On
15 January 15, 2015, Plaintiff filed a joint motion to certify class and preliminarily approve
16 settlement. Dkt. No. 130.

17 **B. The Settlement Agreement**

18 After two mediations before the Honorable Dickran Tevrizian and the Honorable Carl J.
19 West of JAMS, the parties reached a proposed settlement agreement executed on January 14,
20 2015. See Dkt. No. 130-1, Exh A (“Settlement Agreement”). The key terms of the Settlement
21 Agreement are briefly summarized as follows:

22 **i. Class**

23 The Class is defined as follows:

24 All natural persons and entities who are United States residents and
25 who (1) placed GTC Listings on eBay that commenced during the
26 Class Period, and (2) were charged Disputed Fees. Excluded from
the Class are the Judge of this Court and his staff, and all directors,
officers, and managers of eBay, and their immediate families.

27 Id. at § 1.4.

1 **ii. Class Period**

2 The Class period is defined as follows:

3 (1) for Stores Listings, the period from March 30, 2010 to June 19,
4 2012, and (2) for Core Listings and Motors Listings, the period from
September 16, 2008 to June 19, 2012.

5 Id. at § 1.23.

6 **iii. Settlement Fund and Distribution**

7 There are 1,192,947 unique user IDs in the Class.² See Verges Decl. ¶ 16. The Settlement
8 provides for the establishment of a \$6,400,000 Gross Settlement Fund. See Settlement Agreement
9 at § 2.1. The Settlement Agreement provides immediate relief, and a substantial refund, to the
nearly 1.2 million eBay sellers in the Class. See Dkt. No. 140 at 3. There is no claims process,
10 and most sellers will receive an automatic credit without the need to cash a check. See Dkt. No.
11 130 at 8. Class Members with active eBay accounts will receive an automatic credit to their
account. See id. Class Members without active eBay accounts, as well as Class Members with
13 closed accounts, will receive a check. See id.

15 **iv. Final Notice**

16 The Parties have agreed to notify Class Members of the Settlement in the following ways:

17 (i) by email to each Class Member, which shall include a hypertext link to the Settlement website;
18 (ii) by Internet Posting, i.e., a Settlement website created to provide information about the
Settlement, including the Full Notice; (iii) by Mail Notice for those Class Members whose email
19 notices are returned as undeliverable; and (iv) by press release, in order to reach Class Members
20 for whom eBay does not have a current email or postal address. See Dkt. No. 130 at 10.
Beginning on about February 27, 2015, the Claims Administrator also provided toll-free telephone
22 support and assistance for Class Members with questions about the Settlement.³ See Dkt. No.
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² A user ID is a user-chosen identification name associated with an account. Each selling account
26 must have a user ID. However, an eBay user can open multiple eBay accounts, so the same
person may have more than one “user ID.”

27 ³ From February 27, 2015 through May 3, 2015, the Claims Administrator handled 615 telephone
calls. The Administrator also responded to 975 email messages from Class Members.

140-22 (“Baker Decl.”) ¶ 17.

2 **v. Monetary Relief**

3 Payments will be made on a pro rata basis in the form of eBay credits and check payments,
4 and are expected to put more than \$4.5 million into the hands of Class Members, representing
5 approximately 50% of the first month’s renewal fees for the GTC Listings at issue. See Dkt. No.
6 130 at 10.

7 **vi. Attorneys’ Fees and Incentive Award**

8 Class Counsel seeks the “benchmark” 25% fee (\$1,600,000 of the \$6,400,000
9 Settlement Fund), which is less than 1.6 times the lodestar. See Dkt. No. 134 at 2-3. The
10 expenses incurred as of the filing of this motion total \$67,923.16 and are expected to increase by
11 approximately \$5,000 prior to final administration. Class counsel does not seek any interest on
12 this sum. See id.

13 Each Named Plaintiff seeks \$15,000 as an enhancement award for participation as the class
14 representatives in this Action for their assistance with the investigation of the claims, participation
15 in discovery, willingness to litigate on behalf of the Class, and other support provided on behalf of
16 the Class. See id.

17 **vii. Cy Pres Distribution**

18 eBay will not be entitled to a reversion of any amount. Any returned or un-cashed checks
19 shall be used to fund charitable donations, in equal amounts, to

20 (1) the National Cyber-Forensics & Training Alliance, a nonprofit
21 corporation, established in 1997, dedicated to protecting consumers
from cyber-crime and fraud, and

22 (2) the National Consumer Law Center, a nonprofit organization
23 focusing on low income consumer law issues.

24 See Dkt. No. 130 at 9.

25 **viii. Release of Claims**

26 Class Members release all claims and causes of action that are asserted in the Action or
27 could have been asserted based on the allegations in the Action. See id. at 10.

1 **ix. Opting Out and Objectors**

2 Few Class members requested exclusion (97 out of more than 1,188,000 Class members—
 3 0.0082% of the Class), and only 3 *pro se* (0.00025% of the Class) filed objections. See Dkt. No.
 4 140 at 3-4. They are Burgess, Pailes, and Narkin. See Dkt. Nos. 135, 136, 138. Ms. Narkin was
 5 not timely, nor is she a class member.

6 **II. LEGAL STANDARD**

7 A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the
 8 parties to a putative class action reach a settlement agreement prior to class certification, “courts
 9 must peruse the proposed compromise to ratify both the propriety of the certification and the
 10 fairness of the settlement.” Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003).

11 “Approval under 23(e) involves a two-step process in which the Court first determines
 12 whether a proposed class action settlement deserves preliminary approval and then, after notice is
 13 given to class members, whether final approval is warranted.” Nat’l Rural Telecomms. Coop. v.
 14 DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage, the primary
 15 inquiry is whether the proposed settlement “is fundamentally fair, adequate, and reasonable.”
 16 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Having already completed an
 17 preliminary examination of the agreement, the court reviews it again, mindful that the law favors
 18 the compromise and settlement of class action suits. See, e.g., Churchill Village, LLC. v. Gen.
 19 Elec., 361 F.3d 566, 576 (9th Cir. 2004); Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276
 20 (9th Cir. 1992); Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615, 625 (9th Cir. 1982).
 21 Ultimately, “the decision to approve or reject a settlement is committed to the sound discretion of
 22 the trial judge because he is exposed to the litigants and their strategies, positions, and proof.”
 23 Hanlon, 150 F.3d at 1026.

24 An objector to a proposed settlement agreement bears the burden of proving any assertions
 25 they raise challenging the reasonableness of a class action settlement. United States v. State of
 26 Oregon, 913 F.2d 576, 581 (9th Cir. 1990). The court iterates that the proper standard for
 27 approval of the proposed settlement is whether it is fair, reasonable, adequate, and free from

1 collusion - not whether the class members could have received a better deal in exchange for the
2 release of their claims. See Hanlon, 150 F.3d at 1027 (“Settlement is the offspring of
3 compromise; the question we address is not whether the final product could be prettier, smarter or
4 snazzier, but whether it is fair, adequate and free from collusion.”).

5 **III. DISCUSSION**

6 **A. Class Certification**

7 The Federal Rules of Civil Procedure describe four preliminary requirements for class
8 certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.
9 See Fed. R. Civ. P. 23(a)(1)-(4). If these are satisfied, the court must then examine whether the
10 requirements of Rule 23(b)(1), (b)(2), or (b)(3) are satisfied. Wal-Mart Stores, Inc. v. Dukes, 131
11 S. Ct. 2541, 2548-49 (2011).

12 The Rule 23 requirements are more than “a mere pleading standard.” Id. The class
13 representations are subjected to a “rigorous analysis” which compels the moving party to
14 “affirmatively demonstrate . . . compliance with the rule - that is, he must be prepared to prove that
15 there are in fact sufficiently numerous parties, common questions of law or fact, etc.” Id.

16 The Court first assesses whether a class exists under Federal Rule of Civil Procedure 23(a)
17 and (b).

18 **i. Rule 23(a)**

19 Rule 23(a)(1) provides that a class action may be maintained only if “the class is so
20 numerous that joinder of all parties is impracticable.” Fed. R. Civ. P. 23(a)(1). In this context,
21 “impracticability” is not equated with impossibility; it is only an apparent difficulty or
22 inconvenience from joining all members of the class. Harris v. Palm Springs Alpine Estates, Inc.,
23 329 F.2d 909, 913-14 (9th Cir. 1964). Moreover, satisfaction of the numerosity requirement is not
24 dependent upon any specific number of proposed class members, but “where the number of class
25 members exceeds forty, and particularly where class members number in excess of one hundred,
26 the numerosity requirement will generally be found to be met.” Int’l Molders’ & Allied Workers’
27 Local 164 v. Nelson, 102 F.R.D. 457, 461 (N.D. Cal. 1983).

1 Here, Plaintiffs argue that the numerosity requirement is satisfied because the class
2 consists of holders of over one million eBay user IDs, and the parties agree that numerosity is met.
3 See Dkt. No. 130 at 13. Based on that representation, the Court finds that Plaintiffs have made an
4 adequate showing of numerosity.

Turning to Rule 23(a)(2), this section requires that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members “depend upon a common contention,” with “even a single common question” sufficing. Dukes, 131 S. Ct. at 2545, 2557. The common contention must be of such a nature that it is capable of class-wide resolution, and that the “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Dukes, 131 S. Ct. at 2545. Moreover, the permissive standard of commonality provides that “[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists.” Parra v. Bashas’, Inc., 536 F.3d 975, 978–79 (9th Cir. 2008).

15 Here, this case arises out of a user agreement and various webpages that describe the GTC
16 Listing duration and the applicable fees. The user agreement applies to all Class Members, and
17 Plaintiffs contend that all questions related thereto are common. See Dkt. No. 130 at 14. The
18 Fees Schedules and other webpages that mention GTC Listings are likewise applicable to all Class
19 Members. See id. Plaintiffs contend that how GTC Listings were described, how they worked,
20 and the relevant contractual terms are the same for all Class Members, thus establishing
21 commonality. See id. The Court agrees that answering questions, related to these aspects of GTC
22 Listings regardless of the outcome, will resolve the allegations for the whole class. Thus, the
23 Court finds this case meets the commonality requirement of Rule 23(a)(2).

Rule 23(a)(3) requires that the class representative's claims be typical of those of the putative class she seeks to represent. Fed. R. Civ. P. 23(a)(3). The typicality requirement ensures that "the interest of the named representative aligns with the interests of the class." Wolin v. Jaguar Land Rover N. Am. LLC, 617 F.3d 1168, 1175 (9th Cir. 2010). Typicality is measured

1 under a permissive standard and does not require that the representative's claims be substantially
2 identical, but only that they are "reasonably co-extensive with [the claims] of absent class
3 members . . ." Hanlon, 150 F.3d at 1020. Typicality is present when a defendant acts uniformly
4 toward the class members, where that uniform conduct results in injury to the class members, and
5 where the named plaintiffs suffer a similar injury to that of the class members as a result. Hanon
6 v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

7 Here, Plaintiffs' claims arise from the same factual basis as any other member of the
8 Class. Plaintiffs selected the GTC listing duration and testified that they believed the applicable
9 Fees Schedules did not permit eBay to charge recurring fees not mentioned on those Fees
10 Schedules. See Dkt. No. 130 at 14. eBay challenged that assertion, based on the fact that
11 Plaintiffs continued to buy GTC Listings and pay recurring listing fees after they undisputedly
12 knew that such fees would be charged. See id. Plaintiffs contend that eBay's defenses as to
13 Plaintiffs are typical of its defenses as to the entire Class. As such, the typicality requirement is
14 satisfied.

15 Finally, Rule 23(a)(4) requires that the proposed class representative has and will continue
16 to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine
17 if representation is in fact adequate, the court must ask "(1) do the named plaintiffs and their
18 counsel have any conflicts of interest with other class members and (2) will the named plaintiffs
19 and their counsels prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at
20 1020.

21 Here, Plaintiffs contend that the allocation is uniform for all Class Members and applied
22 independently of the particular eBay marketplace or date of listing. See Dkt. No. 130 at 15.
23 Moreover, Plaintiffs had listings throughout the Class Period and have no motivation to allocate
24 more or less of the net settlement fund to any marketplace or time period. See id. In addition,
25 Plaintiffs' attorneys have extensive experience in class action cases and have vigorously
26 conducted discovery, research, and investigation of the Class claims. See Verges Decl. ¶¶ 2-6.
27 Accordingly, the adequacy requirements have been met.

1 **ii. Rule 23(b)**

2 Rule 23(b)(3) provides that a class action can be maintained where: (1) the questions of
3 law and fact common to members of the class predominate over any questions affecting only
4 individuals; and (2) the class action mechanism is superior to the other available methods for the
5 fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); Pierce v. Cnty. of
6 Orange, 526 F.3d 1190, 1197 n.5 (9th Cir. 2008). Certification under Rule 23(b)(3) is appropriate
7 and encouraged “whenever the actual interests of the parties can be served best by settling their
8 differences in a single action.” Hanlon, 150 F.3d at 1022.

9 Predominance exists “[w]hen common questions present a significant aspect of the case
10 and they can be resolved for all members of the class in a single adjudication” Id. at 1022.
11 Here, Plaintiffs contend that this case arises out of a user agreement that describes the GTC
12 Listing duration and the applicable fees. The fees schedules and other webpages that mention
13 GTC Listings are likewise applicable to all class members. Again, Plaintiffs contend that how
14 GTC Listings were described, how they worked, and the relevant contractual terms are the same
15 for all class members, thus establishing predominance. These common questions can be resolved
16 for all members of the proposed class in a single adjudication, and are the central focus of this
17 class action. Accordingly, the Court finds the predominance requirement satisfied.

18 Finally, to meet the requirement of superiority, a plaintiff must show that a class action is
19 the “most efficient and effective means of resolving the controversy.” Wolin, 617 F.3d at 1175–
20 76. “Where recovery on an individual basis would be dwarfed by the cost of litigating on an
21 individual basis, this factor weighs in favor of class certification.” Id. at 1175. Moreover, the
22 class action mechanism is superior to individual actions in consumer cases with thousands of
23 members as “Rule 23(b)(3) was designed for situations such as this . . . in which the potential
24 recovery is too slight to support individual suits, but injury is substantial in the aggregate.”
25 Holloway v. Full Spectrum Lending, No. 06-cv-5975, 2007 WL 7698843, at *9 (C.D.
26 Cal. June 26, 2007).

27 Here, Plaintiffs argue that the class action is superior for resolving this case by settlement

1 because (a) the individual remedy for each Class Member is relatively small, making the expense
2 and burden of continued individual litigation economically and procedurally impracticable; (b) no
3 other litigation on this topic exists; (c) this forum is the best place to concentrate claims based on
4 the location of eBay's headquarters, the evidence, and the witnesses; and (d) the proposed
5 settlement of this case is readily manageable. See Dkt. No. 130 at 16. Moreover, collective
6 resolution of the claims avoids the possibility of duplicative individual controversies or
7 inconsistent future judicial determinations. For these reasons, the Court finds that a class action is
8 the superior method of resolving the claims of all the members.

9 Accordingly, as all requirements of class certification under Rule 23 are met, the
10 settlement class will be certified for the purposes of settlement.

11 **B. Appropriateness of the Notice Plan**

12 Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances,
13 including individual notice to all members who can be identified through reasonable effort." Fed.
14 R. Civ. P. 23(c)(2)(B). Such notice must "clearly and concisely state in plain, easily understood
15 language," the nature of the action, the class definition, and class members' right to exclude
16 themselves from the class, among other things. Fed. R. Civ. P. 23(c)(2)(B). Further, before
17 granting final approval to a proposed class settlement, the court must "direct notice in a reasonable
18 manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1).
19 While Rule 23 requires that reasonable efforts be made to reach all class members, it does not
20 require that each individual actually receive notice. Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir.
21 1994); see also Rannis v. Recchia, 380 F. App'x 646, 650 (9th Cir. 2010).

22 Here, the final class notice list contained 1,188,451 records after analysis for missing
23 addresses. See Baker Decl. ¶ 6. The Claims Administrator determined that, for 20,739 of these
24 records, email addresses were missing or invalid. Id. ¶ 14. The Claims Administrator mailed
25 notices via first class mail to the 20,739 Class Members with missing or invalid email addresses.⁴

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⁴ The Claims Administrator accomplished this after processing all postal addresses via the
28 National Change of Address database maintained by the United States Postal Service.

1 *Id.* ¶¶ 13, 14.

2 On March 2, 2015, the Claims Administrator sent email notice to 1,167,712 valid email
 3 addresses. *Id.* ¶ 9. Of these email notices, 170,746 (approximately 17%) were returned as
 4 undeliverable. *Id.* ¶ 10. On March 12, 2015, the Class Administrator mailed notice to the 170,746
 5 persons whose email was returned undeliverable. *Id.* ¶ 14. Of these mailed notices, 34,065 were
 6 returned undeliverable, further tracing was done by the Class Administrator and 16,635 notices
 7 were re-mailed to updated addresses. *Id.* ¶ 16. As of May 3, 2015, 98.57% of the total 1,188,451
 8 potential Class Members appear to have received direct notice either by email or mail. *Id.*

9 The Court again finds that the notice plan and class notices are consistent with Rule 23,
 10 and that the plan has been fully and properly implemented by the parties and the class
 11 administrator.

12 **C. Fairness of the Settlement**

13 Before approving a class action settlement, the Court must find the settlement “fair,
 14 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *In re Online DVD-Rental Antitrust Litig.*
 15 779 F.3d 934, 944 (9th Cir. 2015). To assess the fairness of a settlement, courts look to the eight
 16 so-called *Churchill* factors:

17 (1) the strength of the plaintiff’s case; (2) the risk, expense,
 18 complexity, and likely duration of further litigation; (3) the risk of
 19 maintaining class action status throughout the trial; (4) the amount
 20 offered in settlement; (5) the extent of discovery completed and the
 stage of the proceedings; (6) the experience and view of counsel; (7)
 the presence of a governmental participant; and (8) the reaction of
 the class members to the proposed settlement.

21 *Online DVD-Rental*, 779 F.3d at 944. (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566,
 22 575 (9th Cir. 2004)). When, as here, settlement occurs before formal class certification, “[t]he
 23 district court’s approval order must show not only that it has explored the Churchill factors
 24 comprehensively, but also that the settlement is not the product of collusion among the negotiating
 25 parties.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011).

26 **i. Strength of Plaintiffs’ Case**

27 In assessing the strength of a plaintiff’s case, “there is no ‘particular formula by which

1 th[e] outcome must be tested.”” Bellinghausen v. Tractor Supply Co., No. 13-cv-02377-JSC, 2015
 2 WL 1289342, at *5 (N.D. Cal. Mar. 20, 2015). Rather, “the court’s assessment of the likelihood
 3 of success is ‘nothing more than an amalgam of delicate balancing, gross approximations and
 4 rough justice.’” Id. The court may “presume that through negotiation, the Parties, counsel, and
 5 mediator arrived at a reasonable range of settlement by considering Plaintiff’s likelihood of
 6 recovery.” Garner v. State Farm Mutual Auto. Ins. Co., No. 08-CV-1365-CW, 2010 WL
 7 1687832, at *9 (N.D. Cal. April 22, 2010).

8 Here, Plaintiffs argue that eBay maintained a vigorous defense throughout the litigation,
 9 where the Court has twice dismissed the fraud-based claims, and dismissed with prejudice all
 10 claims seeking to recover recurring Insertion Fees at any time the operative Fees Schedules stated
 11 that “Insertion Fees are charged every 30-day period,” which is most of the Class Period. See Dkt.
 12 No. 130 at 18; see also Verges Decl. ¶ 18. Moreover, even if the Court were to certify a class over
 13 eBay’s opposition, any verdict would not include most of the Insertion Fees at issue, meaning
 14 Plaintiffs would have to appeal a win at trial to bring those fees into play. Notwithstanding these
 15 obstacles, the Settlement Agreement provides an immediate, substantial refund of recurring GTC
 16 renewal fees. The Settlement represents a good deal for the class in view of the risks posed to
 17 Plaintiffs’ case. Therefore, this factor weighs in favor of the settlement.

18 ii. **The Risk, Expense, and Complexity of Continued Litigation**

19 “Generally, unless the settlement is clearly inadequate, its acceptance and approval are
 20 preferable to lengthy and expensive litigation with uncertain results.” Ching v. Siemens Indus.,
 21 Inc., No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014). Immediate
 22 receipt of money through settlement, even if lower than what could potentially be achieved
 23 through ultimate success on the merits, has value to a class, especially when compared to risky
 24 and costly continued litigation. See LaGarde v. Support.com, Inc., No. C 12-0609 JSC, 2013 WL
 25 1283325, at *4 (N.D. Cal. Mar. 26, 2013).

26 Here, Plaintiffs argue that risks of continued litigation are substantial, as portions of the
 27 case were already dismissed, class certification is not a given, and eBay would almost certainly
 28

1 move for summary judgment if Plaintiffs obtained class certification. See Ching, 2014 WL
 2 2926210, at *4. These procedural obstacles substantially increase the risk that the class would see
 3 no recovery at all. Additionally, the expenses of litigating the case would rise substantially if the
 4 litigation were to continue. Specifically, Plaintiffs would have to analyze data for more than one
 5 million users, and many millions of listings, in order to overcome eBay's defenses to class
 6 certification and on the merits. See LaGarde, 2013 WL 1283325, at *4.

7 As such, this factor favors settlement because it avoids significant delays and provides all
 8 class members with an immediate, substantial benefit in the form of a credit or check. Curtis-
 9 Bauer v. Morgan Stanley & Co., Inc., No. 06-C-3903 TEH, 2008 WL 4667090, at *4 (N.D. Cal.
 10 Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the
 11 litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

12 **iii. The Risk of Maintaining Class Action Status**

13 Although a class can be certified for settlement purposes, the notion that a district court
 14 could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a
 15 settlement. See Rodriguez v. West Publ'g Corp., 563 F.3d 948, 966 (9th Cir. 2009).

16 Here, Plaintiffs contend that eBay has presented myriad arguments in opposition to class
 17 certification, particularly emphasizing the predominance of individual issues in determining both
 18 liability and damages. See Dkt. No. 140 at 14. For example, eBay asserted that Plaintiffs' claim
 19 cannot be certified because extrinsic evidence unique to each seller would be needed to determine
 20 each seller's understanding and expectations regarding the fees for GTC Listings.⁵

21 In addition, eBay and its expert contended that highly individualized information would be
 22 required to assess liability and damages, including: (1) what a Class Member saw, read, or knew
 23

24 ⁵ Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1176-
 25 77 (11th Cir. 2010) (denying certification of contract claim because "[e]ven the most common of
 26 contractual questions—those arising, for example, from the alleged breach of a form contract - do
 27 not guarantee predominance if individualized extrinsic evidence bears heavily on the interpretation
 28 of the class members' agreements"); Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1030 (8th
 Cir. 2010) (denying certification because a contractual ambiguity "opens the door for extrinsic
 evidence about what each party intended when it entered the contract" so the defendant's "liability
 to the entire class for breach of contract cannot be established with common evidence").

1 prior to listings; (2) whether the seller saw, studied and paid invoices with renewal fees; (3) each
 2 Seller's experience with GTC Listings; and (4) each seller's revenues and profits from GTC sales.
 3 See Dkt. No. 140 at 14.

4 The Settlement provides the entire class a recovery on claims that eBay vigorously
 5 disputes and will eliminate the risk that a class could not be certified or maintained throughout the
 6 litigation. This factor also supports approval of the Settlement.

7 **iv. The Amount Offered in Settlement**

8 The fourth Churchill factor "is generally considered the most important." See Bayat v.
 9 Bank of the W., No. C-13-2376 EMC, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015). Here,
 10 at the time of settlement, approximately \$9 million of the total fees at issue were attributable to the
 11 first renewal period; the \$6.4 million settlement fund comprises more than 71% of these renewal
 12 fees. See Verges Decl. ¶ 22. After payment of expenses of administration and the requested
 13 attorneys' fees, the settlement class will receive approximately 50% of these total first month
 14 renewal fees. In addition, the payment represents approximately nine percent of the total (every
 15 renewal month) fees at issue in the case at the time of the Settlement Agreement. Id.

16 This falls in the range of prior approved settlements in class actions, including those
 17 involving eBay sellers. See Custom LED, LLC v. eBay, Inc., 2013WL 6114379, at *14
 18 (approving settlement awarding eBay sellers 1.8% or 16% of the fees at issue and explaining that
 19 "courts have held that a recovery of only 3% of the maximum potential recovery is fair and
 20 reasonable when the plaintiffs face a real possibility of recovering nothing absent the settlement");
 21 In re Omnivision Techs., 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) (approving settlement
 22 awarding class members 9% of potential damages). As such, this factor favors settlement.

23 **v. The Extent of Discovery Completed and the Stage of the Proceedings**

24 This factor "evaluates whether 'the parties have sufficient information to make an
 25 informed decision about settlement.'" Larsen, 2014 WL 3404531, at *5. Formal discovery is not
 26 a requirement for final settlement approval; "[r]ather, the court's focus is on whether the parties
 27 carefully investigated the claims before reaching a resolution." Bellinghausen, 2015 WL

1 1289342, at *7.

2 Here, the parties settled the case more than three years into the litigation - eBay produced
3 over 90,000 pages of documents and over 2 GB of data, including 40,000 transactions worth of
4 sample GTC listing data. See Dkt. No. 130 at 11. eBay deposed both Named Plaintiffs, and
5 Plaintiffs deposed eBay witnesses in California and Utah. Id. Both Parties retained experts,
6 exchanged expert reports, and deposed each other's experts. Id. Plaintiffs' counsel also retained
7 an expert on eBay's database, to help evaluate data queries and the results. Id. In addition,
8 Plaintiffs' counsel has significant experience with eBay and has studied eBay's data architecture
9 and sample data in other cases. Id. Thus, when the parties settled, Plaintiffs' counsel contends
10 that he had a comprehensive and thorough understanding of all of the key issues in the case,
11 including the web pages and disclosures at issue, the functionality and charges for GTC Listings,
12 how such charges are invoiced, and the available electronic data on GTC Listings. See Dkt. No.
13 140 at 16.

14 All of this information allowed the parties to make reasoned and informed settlement
15 decisions. See Bellinghausen, 2015 WL 1289342, at *7 (factor supported approval where parties
16 had litigated multiple motions to dismiss, engaged in formal and informal discovery, produced and
17 analyzed hundreds of pages of documents, prepared detailed mediation briefs, and participated in
18 mediation). As such, this factor weighs in favor of settlement.

19 **vi. The Experience and Views of Counsel**

20 "Parties represented by competent counsel are better positioned than courts to produce a
21 settlement that fairly reflects each party's expected outcome in litigation." Rodriguez, 563 F.3d at
22 967. Consequently, "[t]he recommendations of plaintiffs' counsel should be given a presumption
23 of reasonableness." In re Omnipvision Techns., Inc., 559 F. Supp. 2d 1036, 1043 (N.D. Cal.
24 2009).

25 Here, Plaintiffs' counsel states that he has defended or prosecuted over 20 class actions in
26 the past 20 years and knows the risks both sides face. Dkt. No. 140 at 17. The proposed
27 Settlement is the result of extensive arm's-length bargaining and was achieved only after extensive

1 analysis, hard-fought litigation, and difficult negotiations – including two formal mediations
2 before retired judges (Judge Tevrizian and Judge West of JAMS). See Dkt. No. 130 at 28. Given
3 the uncertainty and substantial expense of going forward with a motion for class certification and
4 trial on the merits against eBay, counsel believes the settlement is in the best interests of the class.
5 Verges Decl. ¶¶ 6, 25. Consequently, this factor favors approval of settlement.

6 **vii. The Presence of a Governmental Participant**

7 The Class Action Fairness Act, or “CAFA,” requires that notice of a settlement be given to
8 state and federal officials and provides those officials a window of time to comment. 28 U.S.C. §
9 1715(b). “Although CAFA does not create an affirmative duty for either state or federal officials
10 to take any action in response to a class action settlement, CAFA presumes that, once put on
11 notice, state or federal officials will raise any concerns that they may have during the normal
12 course of the class action settlement procedures.” Garner, 2010 WL 1687832, at *14. Here, no
13 state Attorney General has responded to the CAFA notice, indicating that such officials either do
14 not object to the Settlement. See Dkt. No. 140 at 17-18. Thus, this factor favors the settlement.

15 **viii. The Reaction of Class Members**

16 A low number of opt-outs and objections in comparison to class size is typically a factor
17 that supports settlement approval. See Hanlon, 150 F.3d at 1027 (“[T]he fact that the
18 overwhelming majority of the class willingly approved the offer and stayed in the class presents at
19 least some objective positive commentary as to its fairness.”). Here, of over 1,188,000 potential
20 Class Members, only 97 have opted out. In addition, only three objections were filed (including
21 one that was not timely), translating into an objection rate of 0.00025%. These statistics indicate a
22 favorable reaction by class members and their overall satisfaction with the Settlement. See
23 Custom LED, 2013WL 6114379, at 9 (granting final approval and characterizing 0.04% exclusion
24 rate, with one objection, as “overwhelmingly positive” reaction); Chun-Hoon v. McKee Foods
25 Corp., 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (explaining that 4.86% opt-out rate strongly
26 supported approval).

ix. Risk of Collusion among the Negotiating Parties

In addition to examining the eight Churchill factors, when a settlement is reached prior to formal class certification the Court must ensure that the settlement is not the product of collusion. See In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946–47. Collusion may not be evident on its face, thus the Ninth Circuit has provided examples of subtle signs of collusion including: (1) “when counsel receive a disproportionate distribution of the settlement;” (2) “when the parties negotiate a ‘clear sailing’ arrangement providing for the payment of attorneys’ fees separate and apart from class funds;” and (3) “when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.” Id. at 947.

Here, Plaintiffs’ counsel is seeking for only the “benchmark” 25% fee, which is a lodestar multiplier of less than two. See Dkt. No. 134 at 2. There are no coupons or “soft” values to the settlement amount upon which Plaintiffs’ counsel predicates its fee request. See Dkt. No. 134 at 9. Each settlement class member will automatically receive an account credit or a check. See id. Moreover, it is not possible for class counsel or the class representatives to receive any special benefit in the settlement, because their awards are not conditions of the settlement, and any reduction in the awards serves only to increase the net settlement fund payable to the class. See Settlement Agreement ¶¶ 2.1 (a), (b).

Consequently, the settlement displays none of the Bluetooth signs suggesting a collusive agreement. Accordingly, this factor along with the eight Churchill factors, weighs in favor of finally approving the settlement.

IV. ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS

The attorneys’ award must be reasonable, even if the parties have already agreed to an amount. In re Bluetooth Headset Prod.s Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011). Courts have discretion to award attorneys’ fees to a prevailing plaintiff if: “(1) fee-shifting is expressly authorized by the governing statute; (2) the opponents acted in bad faith or willfully violated a court order; or (3) the successful litigants have created a common fund for recovery or extended a substantial benefit to a class.” Id.

1 “Where a settlement produces a common fund for the benefit of the entire class, courts
2 have discretion to employ either the lodestar method or the percentage-of-recovery method.” Id.
3 at 942. The former method is routinely used when “the relief sought, and obtained, is often
4 primarily injunctive in nature and thus not easily monetized.” Id. The figure is calculated “by
5 multiplying the number of hours the prevailing party reasonably expended on the litigation (as
6 supported by adequate documentation) by a reasonable hourly rate for the region and for the
7 experience of the lawyer.” Id. The court can “adjust [the figure] upward or downward by an
8 appropriate positive or negative multiplier reflecting a host of ‘reasonableness’ factors, including
9 the quality of representation, the benefit obtained for the class, the complexity and novelty of the
10 issues presented, and the risk of nonpayment.” Id. at 941-42. “Foremost among these
11 considerations, however, is the benefit obtained for the class.” Id. at 942.

12 Under the latter method, the court awards as fees a percentage of the common fund in lieu
13 of the lodestar amount. Id. “[C]ourts typically calculate 25% of the fund as the ‘benchmark’ for a
14 reasonable fee award, providing adequate explanation in the record of any ‘special circumstances’
15 justifying a departure.” Id. Relevant factors to a determination of the percentage ultimately
16 awarded include: “(1) the results achieved; (2) the risk of litigation; (3) the skill required and
17 quality of work; (4) the contingent nature of the fee and the financial burden carried by the
18 plaintiffs; and (5) awards made in similar cases.” Tarlecki v. bebe Stores, Inc., No. C 05-1777
19 MHP, 2009 WL 3720872, at *4 (N.D. Cal. Nov. 3, 2009).

20 “Though courts have discretion to choose which calculation method they use, their
21 discretion must be exercised so as to achieve a reasonable result.” Id.

22 **A. Percentage of the Fund**

23 Plaintiffs’ counsel negotiated a \$6.4 million Settlement Fund. See Dkt. No. 134 at 2.
24 Plaintiffs’ counsel seeks a fee award of \$1,600,000, which is equal to 25% of the Settlement Fund.
25 See id.

26 Plaintiffs’ counsel argues that the case presented novel and complex questions and that he
27 faced a substantial risk of non-payment because he took the case on a contingency basis. See id. at
28

1 14-15. In addition, counsel contends that the benefit to the class is substantial and points out that
2 the award requested is consistent with that awarded in other similar cases. See id. at 12-13.
3 Specifically, that class members will receive 50% of the fees associated with the first renewal of
4 every GTC Listing ever placed during the 4-year class period. See id. Finally, counsel argues that
5 he worked diligently to keep costs low; for example, obtained competing bids from various
6 potential administrators to find a competent and cost-effective administrator to minimize the
7 expense of administration. See id.

Having considered the relevant factors, the Court agrees with Plaintiffs’ counsel that this action posed a substantial risk and required significant time and skill to obtain a result for the class. Moreover, counsel’s request is not disproportionate to the class benefit and is comparable to awards approved in other similar internet privacy class actions, including two previously approved by this Court. See In re Netflix Privacy Litig., 2013 WL 1120801, at *9–10 (approving benchmark award of \$2.25 million); see also In re Google Referrer Header Privacy Litig., 2015 WL 1520475, at *9-10 (approving a benchmark fee amounting to 25% of the settlement fund). Accordingly, a benchmark fee award of amounting to 25% of the settlement fund is appropriate.

B. Lodestar Comparison

The Ninth Circuit encourages district courts “to guard against an unreasonable result” by cross-checking attorneys’ fees calculations against a second method. In re Bluetooth, 654 F.3d at 944. Since a 25% benchmark award might be reasonable in some cases but arbitrary in cases involving an extremely large settlement fund, the purpose of the comparison is to ensure counsel is not overcompensated. In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 109 F.3d 602, 607 (9th Cir. 1997).

23 Here, Plaintiffs' counsel calculates a lodestar figure of over \$1,035,000 for 2600 hours, to
24 which they apply a 1.6 multiplier. See Verges Decl. ¶ 7. They also seek \$72,923.16, in
25 reimbursement of all out of pocket expenses incurred through final administration of the
26 settlement. See Dkt. No. 134 at 2. This represents an overall average billing rate of \$397 per hour
27 and a maximum partner level rate of \$450 per hour; associate \$315 per hour; and paralegal \$195

1 per hour. See Magsafe Apple Power Adapter Litig., 2015 WL 428105, at *14 (N.D. Cal. Jan. 30,
2 2015) (In the Bay Area, reasonable hourly rates for partners range from \$560 to \$800, for
3 associates from \$285 to \$510, and for paralegals and litigation support staff from \$150 to \$240);
4 Rose v. Bank of Am. Corp., No. 5:11-CV-02390-EJD, 2014 WL 4273358, at *12 (N.D. Cal. Aug.
5 29, 2014) (finding reasonable: partners rates between \$350 - \$775 per hour; associates at \$325 -
6 \$525 per hour; and paralegal rates between \$100 - \$305 per hour).

7 Counsel points out that only one attorney attended each deposition to either question a
8 witness or prepare and defend the named Plaintiffs and Plaintiffs' expert. Verges Decl. ¶ 14. In
9 addition, the only time more than one lawyer attended anything were the two mediations, where
10 two attorneys from counsel's firm attended each single-day mediation. See Dkt. No. 134 at 17.
11 Counsel again argues that the settlement amount, which net of the requested attorneys' fees will
12 result in a 50% payment of all first renewal fees for all GTC Listings, is a good result for the class
13 members. See Dkt. No. 134 at 19. Finally, the resulting multiplier is in the range of acceptable
14 lodestar multipliers. See Dyer v. Wells Fargo Bank, N.A., 303 F.R.D. 326, 334 (N.D. Cal. 2014)
15 (applying 2.83 multiplier); In re Netflix Privacy Litig., No. 5:11-CV-00379 EJD, 2013 WL
16 1120801, at *10 (N.D. Cal. Mar. 18, 2013) (approving 25% award that was 1.66 times lodestar);
17 see also Craft v. City of San Bernardino, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (court
18 ordered attorneys' fee of \$6.375 million, or 25% of the settlement fund, where lodestar cross-
19 check showed a multiplier of 5.2).

20 Plaintiffs' counsel has provided sufficient support for its proposed lodestar calculation.
21 The amount of hours and other costs attributed to this case are reasonable in light of the efforts
22 required to litigate and ultimately engage in a lengthy settlement process. Importantly, counsel
23 notes that they do not suffer from any of the Magsafe issues.⁶ In addition, the hourly rates charged
24

25 _____
26 ⁶ Those issues were described as follows: "(1) attorney rates were as high as \$850 per hour; (2)
27 five different law firms submitted bills; (3) class counsel spent over 4,600 hours between May
2009 and August 2010, and another 1136.75 hours thereafter; and (4) as many as six partners from
28 different law firms attended mediation or hearings." In re Magsafe Apple Power Adapter Litig.,
No. 5:09-CV-01911-EJD, 2015 WL 428105, at *10-14 (N.D. Cal. 2015).

1 fall within the range of those approved in other similar cases, and the suggested lodestar multiplier
2 of 1.6 is comparable or lower to that previously permitted by other courts in similar internet
3 privacy cases. Accordingly, the lodestar cross-check confirms the reasonableness of the
4 percentage-based calculation.

5 **C. Incentive Awards**

6 “[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs,
7 are eligible for reasonable incentive payments.” Staton v. Boeing Co., 327 F.3d 938 (9th Cir.
8 2003). To determine the appropriateness of incentive awards a district court should use “relevant
9 factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree
10 to which the class has benefitted from those actions ... the amount of time and effort the plaintiff
11 expended in pursuing the litigation ... and reasonabl[e] fear[s of] workplace retaliation.” Id.

12 Here, Plaintiffs request \$15,000 to each class representative to compensate them for the
13 time they have invested in this case and the risk they undertook of non-recovery. See Dkt. No.
14 134 at 21. Plaintiffs argue that there was a very real and significant risk because they rejected an
15 earlier and much lower settlement proposal by eBay in January 2014 in order to further pursue
16 discovery and class certification. Verges Decl. ¶ 18. They believe this exposed them to thousands
17 of dollars in costs, which eBay stood to recover. See 28 U.S.C. §1920. In addition, Plaintiffs
18 argue that eBay put each of the Plaintiffs’ accounts under a virtual microscope in an effort to
19 disqualify them as Class Representatives and threatened counterclaims for allegedly unpaid fees.
20 See Dkt. No. 134 at 23.

21 Each of the Plaintiffs estimates that they spent in excess of 150 hours over the
22 approximately three and one-half years this case has been pending. See id. The Plaintiffs also
23 studied each of Plaintiffs’ pleadings before they were filed, all discovery submitted to Plaintiffs,
24 and each of the pleadings filed by eBay. See id. Finally, Plaintiffs’ counsel argues that the time,
25 inconvenience, and distraction of this litigation over four years cost them over \$15,000 in lost
26 opportunity. See id.

27 The Court recognizes that the Plaintiffs went to great lengths to protect the interests of the
28

1 class and invested time and effort in pursuing this litigation. However, the Court is not persuaded
2 that this case warrants an upward departure from the established incentive awards. In this district,
3 \$5,000 for each class representative is presumptively reasonable. Jacobs v. Cal. State Auto. Ass'n
4 Inter-Ins. Bureau, No. C 07-00362 MHP, 2009 WL 3562871, at *4-5 (N.D. Cal. Oct. 27, 2009);
5 see also Chao v. Aurora Loan Services, LLC, No. C 10-3118 SBA, 2014 WL 4421308, at *4
6 (N.D. Cal. Sept 5, 2014) (noting that “Plaintiffs’ ... request for a \$7,500 incentive award for each
7 representative Plaintiff is above the \$5,000 figure which this Court has determined is
8 presumptively reasonable”).

9 Accordingly, the Court DENIES Plaintiffs’ request for \$15,000 in incentive awards for
10 each class representative and finds that \$5,000 for class representative is presumptively
11 reasonable.

12 **V. OBJECTIONS**

13 The Court now addresses the points raised in the three written objections⁷, keeping in mind
14 that objectors to a class action settlement bear the burden of proving any assertions they raise
15 challenging the reasonableness of a class action settlement. Oregon, 913 F.2d at 581 (9th Cir.
16 1990).

17 The objectors have not satisfied this burden. All three objections were submitted *pro se*,
18 and none raises any substantive concerns about the fairness, reasonableness, or adequacy of the
19 Settlement. In addition, the Narkin Objection is untimely, and Narkin is not a member of the
20 Settlement Class.

21 Burgess attacks the proposed class incentive awards as a payment to class representatives
22 in violation of Radcliffe v. Experian Information Solutions, Inc., 715 F.3d 1157 (9th Cir. 2014).
23 In Radcliffe, the settlement agreement explicitly conditioned incentive awards on the class
24 representatives’ support for settlement. In addition, the maximum amount any class member
25 could receive under the settlement was \$750, which the court found compared unfavorably with

26
27 ⁷ They have been filed by Reginald Burgess (“Burgess”) (Dkt. No. 135); Daniel Pailes (“Pailes”)
28 (Dkt. No. 136); and Sebrina Narkin (“Narkin”) (Dkt. No. 138).

1 the \$5,000 incentive awards. Radcliffe, 715 F.3d at 1165. In contrast, the Settlement Agreement
2 imposes no conditions on incentive awards. Settlement Agreement ¶ 2.1(a). Moreover, the Court
3 has adjusted incentive awards to be consistent with the value of the class benefit, and notes that the
4 approved amounts are consistent with the relevant Ninth Circuit authority.

5 Next, Burgess appears to argue that class certification is improper, but does not address
6 any of the Rule 23 criteria that were set forth in the Motion for Preliminary Approval. See Dkt.
7 No. 135 at 2, 5. As set forth in that motion, all persons who placed GTC Listings and paid
8 recurring fees are sufficiently similarly situated to be treated as a class for settlement purposes.
9 See Dkt. No. 130 at 12-15.

10 Burgess also objects to class counsel because they are an out of state law firm. See Dkt.
11 No. 135 at 5. Burgess' objection is unfounded because class counsel was approved by the Court,
12 was admitted *pro hac vice*, associated with California counsel, and has successfully represented
13 classes against eBay in other matters in this District and Division. See Alamo v. eBay, No. C 09-
14 01733-EJD (N.D. Cal. Dec. 18, 2009).

15 Pailes objects that the Plaintiffs' counsel will receive more than 25% of the settlement.
16 See Dkt. No. 136 at 3. This objection is unfounded because the requested amount of attorneys'
17 fees is exactly 25% of the Settlement Fund. See Dkt. No. 134 at 2.

18 Finally, Narkin is not a class member, nor did she timely file her objection. Dkt. No. 138.
19 eBay's records show that no one by her name or using her user ID paid any recurring GTC Listing
20 fees during the Class Period. See Dkt. No. 140-23 ("Vasireddy Decl.") ¶¶ 3-4. The deadline for
21 filing objections was April 20, 2015, and the Narkin Objection was not filed until April 24, 2015.
22 See Doc. 133 ¶ 10 at 7.

23 For these reasons, the Court is unpersuaded by the objections. They are each overruled.

24 **VI. CONCLUSION**

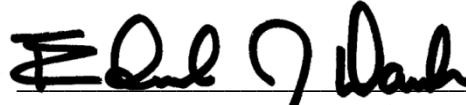
25 Based on the foregoing reasons, the Court rules as follows:

26 1. Plaintiffs' Motion for Final Approval of Class Action Settlement is GRANTED; and
27 2. Plaintiffs' Motion for Award of Attorneys' Fees and Expenses and Class Representatives

1 Incentive Awards is also GRANTED. The Court awards \$1,600,000 in attorneys' fees,
2 \$72,923.16 in expenses, and \$5,000 to each class representative in incentive awards.
3 The Clerk shall close this file upon entry of Judgment.

4 **IT IS SO ORDERED.**

5 Dated: September 15, 2015

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7 EDWARD J. DAVILA
United States District Judge

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United States District Court
Northern District of California